Supreme Court, U.S.
FILED

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No. 98-_____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1998

GERALD HUFFMAN, *et al*,
Petitioners,

vs.

COUNTY OF LOS ANGELES, *et al*,
Respondents.

Petition For Writ of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

CAROL A. WATSON,
Counsel of Record
MANES & WATSON
3435 Wilshire Boulevard
Suite 2900
Los Angeles, California 90010
(213) 381-7793
Attorneys for Petitioners

QUESTIONS PRESENTED

Whether municipal liability under 42 U.S.C. §1983 may be predicated upon harm inflicted by a person who was not acting under color of law but who was acting pursuant to a policy and widespread custom and practice of a public entity which created a danger to the public; or, more specifically, where a county and its sheriff require or encourage their off-duty deputy sheriffs to carry firearms at all times, including when they are consuming alcohol, and there is a widespread custom and practice of doing so, may the county and its sheriff be held liable for an unreasonable shooting of a person by an intoxicated off-duty deputy sheriff even though the policy, custom and practice were not directed at specific individuals?

LIST OF PARTIES

Petitioners Gerald Huffman and Gunilla Lukse were plaintiffs and appellees in the courts below. They are the parents of decedent John Huffman.

Respondents are the County of Los Angeles and its Sheriff, Sherman Block. They were defendants and appellants in the courts below.

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Appendix A – Opinion of the United States Court of Appeals for the Ninth circuit, reported at *Huffman v. County of Los Angeles*, 147 F.3d 1054 (9th Cir. 1998) ..... App - 1

Appendix B – Order of the United States Court of Appeals for the Ninth Circuit denying rehearing and hearing *en banc* ..... App - 16

Petitioners Gerald Huffman and Gunilla Lukse respectfully request that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit which is set forth in its published opinion.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth circuit, reported at *Huffman v. County of Los Angeles* 147 F.3d 1054 (9th Cir. 1998), appears in the Appendix [Appendix A, App - 1]. The Ninth Circuit denied rehearing [Appendix B, App - 16].

JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Ninth Circuit was filed on June 23, 1998. A timely petition for rehearing was denied by the Court of Appeals on October 16, 1998.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U. S. C. §1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

The 14th Amendment to the United States Constitution, Section 1, provides in relevant part:

> **Section 1.** . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In this case, Thomas Kirsch, an off-duty deputy sheriff employed by the County of Los Angeles, while armed and under the influence of alcohol, shot and killed John Huffman, petitioners' son. The deputy was acting in conformity with policies of the Los Angeles Sheriff Department [LASD] and a widespread custom and practice that deputy sheriffs carry firearms at all times, including when they are consuming alcohol.

Petitioners contend that the respondents created a danger that an off-duty deputy sheriff, while impaired by the effects of alcohol, would injure or kill a member of the public; and that respondents, having created such a danger, are liable to plaintiffs, whether or not the off-duty deputy sheriff here was acting under color of law, and whether or not respondents could predict the specific incident that resulted in the deprivation of rights protected by the Constitution.

Respondents, by reason of numerous prior instances of the misuse of firearms by intoxicated off-duty deputy sheriffs, and because of the longstanding and widespread custom, were aware of the danger but made a policy decision not to restrict the carrying of firearms while consuming alcohol and they made a decision to take no corrective action in this case [allegedly deferring any possibility of taking action until after the trial in the district court].

A. Proceedings in the District Court

In October, 1996, the case was tried to a jury in the district court. After presentation of the evidence and instructions by the court, the jury rendered its verdict in favor of petitioners which included the following findings:

-- The County of Los Angeles and Sheriff Sherman Block had a policy or custom which required or encouraged deputy sheriffs to carry a firearm at all times while off duty.

-- As a result of that policy or custom, there arose a significant risk that off-duty deputy sheriffs who were mentally or physically impaired would injure or kill others while in a mentally or physically impaired state.

-- The County of Los Angeles and Sheriff Sherman Block were deliberately indifferent to the need to instruct and train deputy sheriffs about the danger of carrying firearms off duty while physically and mentally impaired.

-- The deliberate indifference of defendants County and Block was a legal cause of the death of John Huffman.

The County of Los Angeles and the Sheriff appealed the denial of their motions for new trial and for judgment as a matter of law.

B. Proceedings in the Court of Appeals

The Ninth Circuit reversed the judgment of the trial court holding that petitioners could not prevail against respondents on the danger-creation theory of liability because the fatal shooting incident was the result of "private acts" and therefore not foreseeable.

The court noted the existence of a conflict between the circuits on whether or not the danger created by a defendant must be directed at a specific plaintiff. It denied that it was deciding that question [which had not been raised in the trial court and therefore was not preserved for appeal] but the text of the opinion reveals that it did in fact decide that the specific incident must be predictable.

The opinion recites the facts of the shooting incident in the light most favorable to respondents and does so in great detail in order to support its "private acts" rationale. However, it is undisputed that the shooting was unreasonable and unjustified. The underlying, and manifestly foreseeable, incident may be summarized more succinctly as follows: two men in a bar, one of them armed, both under the influence of alcohol, a dispute ensues, the man with the gun shoots the other man.

The facts relating to the liability of the County and the Sheriff, the only parties whose liability was at issue, were

treated in cursory fashion in the opinion and in some respects as if they were mere conjecture.

The evidence at trial showed that respondents (1) had a policy which required and encouraged deputy sheriffs to carry firearms at all times, (2) had a longstanding and widespread custom within LASD that deputy sheriffs carried firearms while off duty and while consuming alcohol, (3) made a policy decision to refrain from restricting the carrying of firearms by its off-duty deputy sheriffs, (4) had notice of repeated instances of misuse of firearms by intoxicated, off-duty deputy sheriffs, (5) had a practice of failing to train, investigate, or impose appropriate discipline concerning the use of firearms by off-duty deputy sheriffs, (6) had taken no action, more than two years after the incident, to discipline the deputy sheriff who shot petitioners' son.

The facts, as they relate to the liability of respondents, may be summarized as follows:

Thomas Kirsch became a deputy sheriff with the Los Angeles Sheriff Department in 1970. During more than 20 years of his employment, the written policy of the Los Angeles Sheriff Department [LASD] required that deputy sheriffs carry firearms at all times, which includes times when they were off duty and when they were consuming alcohol. In approximately 1991 or 1992, the written policy was changed to leave to the discretion of the deputy sheriffs the decision as to whether and

when to carry firearms while off duty. The custom and practice of carrying firearms at all times did not change. It was and is the custom in LASD that most deputy sheriffs carry guns off duty, including while consuming alcohol.

LASD has no restrictions relating to the carrying of firearms while under the influence of alcohol and the only LASD restriction concerning the use of alcohol off duty is a regulation that the deputies not be so intoxicated that they are unable to care for themselves or others. LASD makes no connection between the drunk and disorderly regulation and the carrying of guns off duty.

It is, in part, through training that LASD conveys its policies and practices and standards. Thomas Kirsch received no training or suggestion that he should not carry a gun while drinking alcohol. He has never been provided with any written procedures or training bulletins or special orders, or any written materials on the subject. He stated, under penalty of perjury, that he was required and encouraged to carry a gun at all times. He was trained that he was a deputy sheriff 24 hours a day.

LASD knew of at least 80 incidents, between 1989 and 1994,[1] in which there were allegations that off-duty deputy

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[1] The disclosures began with one incident in December, 1989 and ended in mid-1994. A reasonable inference may be drawn that there were more incidents than were disclosed.

(continued...)

sheriffs had discharged or brandished firearms. Approximately one-half of the incidents disclosed involved freeway disputes. Approximately six involved personal disputes in which officers fired guns. Approximately fifteen of the incidents that were disclosed involved situations in which the use of alcohol was undisputed. There were additional instances in which it appeared that alcohol was involved but in which LASD failed to mention that fact in its investigative reports, *e.g.* incidents outside of bars or parties. There were numerous instances in which significant delays occurred in obtaining blood alcohol samples from deputies involved in off-duty gun incidents where it appeared that alcohol was involved. In one case the delay between the officer involved shooting and the testing for blood alcohol was 12 ½ hours.

LASD did not analyze any patterns of misconduct relating to the use of guns off duty and had not done, within the past ten years, any study, audit, compilation, or report of statistics, or data relating to officer involved shootings by off-duty deputy sheriffs. It is the express policy of LASD that it

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[1](...continued)
The district court file is replete with representations by respondents that reports, some of which were ultimately produced, either did not exist or could not be located. Information was not kept in any organized fashion and was produced in "dribs and drabs" when files were located. For many years, LASD did not routinely investigate or internally review incidents in which off-duty officers shot and wounded or killed people.

does not restrict the use or carrying of a gun by an off-duty deputy even if he is intoxicated.

The manner in which police officials investigate incidents of alleged misconduct sends a message to the officers on the street as to the expectations of management. The purpose of criminal investigations is to provide information to a prosecutor who decides whether to proceed with a criminal case. The purpose of internal investigations and review is to determine whether administrative policies were violated.

Its failure to investigate off-duty gun incidents sent a clear signal that LASD tolerates such conduct.

The adequacy of discipline is another method by which policymakers send a message about their standards. In the opinion of petitioners' police practices expert, LASD showed at least deliberate indifference by failing to impose appropriate discipline.

It is inappropriate for a law enforcement agency to rely on a civilian jury in forming its opinions and conclusions about the propriety of an off-duty incident because it is the job of police administrators to impose discipline; but in its internal review of this case, LASD had made no final decision to impose any discipline more than two years after the incident. LASD elected not to make a decision until after the jury decided the case.

Model standards for police agencies, and policies of such cities as Houston, Chicago, New York, San Jose, concerning the carrying of guns off duty prescribe that police managers impose restrictions. LASD's policy of leaving the decisions entirely to off-duty deputies ignores LASD's own experience.

Respondents do not dispute that the shooting was unreasonable. In fact, in the court below, they characterized it as "obviously wrong" and "witless."

The court below recognized that respondents could be liable if they created the danger, even if the deputy sheriff was not acting under color of law at the time of the incident; but the court ultimately concluded that, by virtue of Kirsch's private acts, this specific incident was unforeseeable and therefore petitioners could not prevail.

REASONS FOR GRANTING THE WRIT

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW DECIDES AN IMPORTANT QUESTION OF FEDERAL LAW ON THE SCOPE OF THE DANGER-CREATION THEORY OF LIABILITY THAT HAS BEEN RAISED BUT NOT SETTLED BY THIS COURT AND THAT CONFLICTS WITH DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS.

In *DeShaney v. Winnebago County Social Service Department*, 489 U.S. 189 (1989), this Court was presented with the question of whether liability would lie under Section 1983 against local officials for their failure to remove a child from a home where it was known he had been abused by his father and where the child ultimately died at the hands of his father.

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The Court observed that the general rule is that a state actor is not liable for harm to another caused by the conduct of a third person. The Court described two exceptions to the general rule: when a person is in the custody of the state or when the state created the danger which caused the harm.

In *DeShaney*, the Court held that there was no liability

because the child was not in the County's custody and that the County "played no part" in creating the dangers nor did anything to render the victim more vulnerable to them.

After the decision in *DeShaney*, the circuit courts of appeals began applying the danger-creation theory to a variety of factual settings, and in cases involving both individual and municipal liability. The opinions are in conflict on the scope and application of the theory.

The Ninth Circuit applied the theory in *Wood v. Ostrander*, 879 F.2d 583, (9th Cir., 1989) in which plaintiff's due process claim was sustained where a police officer created a danger when he arrested the driver of plaintiff's car and left her alone to find her way home and she was raped.

In *L.W. v. Grubbs*, 974 F.2d 119, 120-121 (9th Cir., 1992), plaintiff was a nurse employed by a prison facility who was sexually assaulted by an inmate. She sued her supervisors for assigning her to work with an inmate whose history of assaultive behavior against women was known to them and for failing to tell her of the risk in which they placed her. The inmate was not named as a defendant and was not deemed to be a state actor. The court held that the defendants could be held liable because they, in their capacity as state correctional officers, created an opportunity for the inmate to assault plaintiff that would not otherwise have existed.

The Ninth Circuit held that there was sufficient evidence to go a jury on the question of the County's deliberate indifference to the safety of plaintiff in *Redman v. County of San Diego*, 942 F.2d 1435 (9th Cir., 1991) (*en banc*), where plaintiff, a pre-trial detainee, was raped in his cell by an inmate. The County created the danger by its policy of housing aggressive homosexual inmates in the general jail population.

In *Penilla v. City of Huntington Park*, 115 F.3d 707, 710-11 (9th Cir., 1997), the Ninth Circuit relied on *DeShaney* in holding that officers could be liable for creating a danger resulting in the death of a man where they canceled a 911 call to paramedics; they dragged the sick man from his porch, where he was in public view, into his empty house; they locked the door and left him there alone after examining him and finding him to be in serious medical need.

Until its opinion in this case, the Ninth Circuit had not decided that the danger that was created must be foreseeable as to the persons involved or the specific incident that occurred. Compare: *Van Ort v. Estate of Stanewich*, 92 F.3d 83 (9th Cir. 1996) in which the court decided the county was not liable for its hiring of a deputy sheriff who had a history of violence and who, while off duty, robbed and tortured members of a household. The rationale for the decision was not that the victims were not foreseeable but rather that it was not foreseeable that the deputy sheriff would become a free lance criminal.

Gibson v. City of Chicago, 910 F.2d 1510, 1519-22 (7th Cir., 1990) is a case remarkably like this case in which the Seventh Circuit reversed a grant of summary judgment for the City of Chicago which was alleged to have a policy of inadequate procedures for recovering firearms from officers who had been relieved of duty for mental impairments. An officer who had been so relieved, and was not acting under color of law, shot and killed a man. The court, in a cogent discussion of standards set in the prior decisions of this Court, including *Canton* and *DeShaney*, and similar cases in other circuits, concluded that, accepting the factual allegations of the plaintiff as true--that the City played a part in creating a danger and rendering the public more vulnerable to the danger, summary judgment was inappropriate.

Noting that *Martinez v. California*, 444 U.S. 277 (1980) (in which a released parolee, five months after release, killed a person whose identity was unknown to the parole board) suggests that the linkage between government action and the ultimate injury might be greater if the government is aware of danger to a particular individual, as opposed to society at large, the United States Court of Appeals for the Seventh Circuit observed, citing examples from other circuits, that "some types of injury, by their very nature, will choose their victims at random."

In *Reed v. Gardner*, 986 F.2d 1122, 1127 (7th Cir., 1993), the Seventh Circuit again addressed the issue. The

defendants permitted an intoxicated man to drive a car after arresting the driver for driving under the influence and the intoxicated man caused a head-on collision. Defendants argued that liability should not attach because the danger that was created was to the general public. The court held,

> When police create a specific danger, they need not know who in particular will be hurt. Some dangers are so evident, while their victims are so random, that state actors can be held accountable by any injured party.

Given the extent to which the proposition that "guns and alcohol don't mix" is fixed in the public consciousness, it cannot be claimed that the danger of combining them is unforeseeable. Notwithstanding its disclaimer, the focus of the opinion below is on the foreseeability of the specific parties or incident. Petitioners contend it is the danger that must be foreseeable, not the details of the outcome.

The danger created by armed and intoxicated individuals who are armed solely because of their employment with respondents is so evident and the potential victims so random that respondents should not be able to avoid responsibility by claiming they could not predict that Thomas Kirsch would shoot John Huffman in a cocktail lounge on August 3, 1996.

Other circuits have rendered conflicting decisions on the

scope of the danger-creation theory, some requiring a special relationship between the state actor and the victim. For example, in
Mark v. Borough of Hatboro, 51 F.3d 1137, 1153 (3d Cir., 1995), the Third Circuit held that liability could not be predicated upon the failure of a local volunteer fire department for its failure to screen out a firefighter who committed arson while off-duty. The court's rationale was that the alleged policy was directed at the public at large and that there was "no relationship between the defendant and the plaintiff."

The Eighth Circuit reached a similar result in *Carlton v. Cleburne County*, 93 F.3d 505, 509 (8th Cir., 1996) when a county was relieved of liability for its failure to repair a bridge which it had promoted as a tourist attraction and which it knew was deteriorating. The court held that neither the County's "actions nor inactions placed these particular individuals in a position of danger" and that there was no constitutional violation because the County's action "was directed toward members of the general public." Also see: *Bradberry v. Pinellas County*, 789 F.2d 1513 (11th Cir., 1986): no liability against a lifeguard because "[t]he state did not kill [decedent], the ocean did."

The issue of danger creation by state actors is one that arises with regularity and should be decided by this Court in order to provide guidance to trial courts and to establish uniformity of the law on the important question of when

municipal liability may be predicated upon harm inflicted by a third person who was not acting under color of law but who was acting pursuant to a policy, custom and practice of a public entity.

The opinion below, by requiring foreseeability of the facts of a specific incident, renders meaningless the decisions of this Court on the question of municipal liability and it nullifies the remedial purposes underlying the Civil Rights Act.

To require predictability of the parties to or the specific facts of an incident is inconsistent with the public policy of providing a remedy for widespread abuses. The more widespread the problem, the less predictable are the potential victims; but the more widespread the problem, the greater is the need for remedial measures.

The foreseeability doctrine articulated in the opinion below promotes abuse of power and irresponsible policies concerning firearms, unchecked by any countervailing method of accountability.

This Court has limited municipal liability to cases in which the municipality has a policy, custom or practice that causes a violation of a right protected by the Constitution. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978).

The Court has made clear that municipal liability will not lie where evidence of a custom or practice is based on a single incident (*City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985)) and liability may not be based upon a single hiring decision. *Bryan County, Okla. v. Brown*, ___ U.S.___, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997).

This Court has never held that the identities of the state actors or potential victims must be foreseeable. It is conduct likely to cause deprivations of constitutional rights which has been the subject of decisions of this Court.

In *City of Canton v. Harris*, 489 U.S. 378, 388 (1989) the Court held that an entity's custom, policy or practice of failing to train its police officers is actionable under §1983 if the failure amounts to deliberate indifference to the rights of those "persons with whom the police come into contact" and a city's inhabitants. In *Canton*, plaintiff alleged that she was denied proper medical attention while in custody because the City of Canton had a policy which vested complete discretion in police supervisors concerning when prisoners would be provided with medical treatment and that the City had not adequately trained the supervisors to recognize when medical treatment was needed.

> The Court concluded that
> the need for more or different training [was] so
> obvious, and the inadequacy so likely to result

> in the violation of constitutional rights, that the policy makers of the city can reasonably be said to have been deliberately indifferent to the need.

Id., 489 U.S. at 390.

The Court's approach to foreseeability was one based on a common sense assessment of what is obvious and likely, not on whether a specific person or incident could be foreseen.

In *Monell*, the threshold case establishing municipal liability, the potential victims of the offending policy consisted of a large class of people. And in *Brown, supra*, this Court did not hold that the misconduct must have been directed at a specific individual when it decided that a single hiring decision may not be the basis for municipal liability.

The decisions of the Court on the issue of causation have not been based upon a restrictive interpretation of foreseeability but rather on the link between the conduct of a municipality and the resulting harm. See: *Polk County v. Dodson*, 454 U.S. 312, 326 (1981): The policy must be the "moving force" behind the harm. *Oklahoma City v. Tuttle, supra*, 471 U.S. at 823: There must be an "affirmative link" between the policy and the harm. *Jett v. Dallas Independent School District*, 491 U.S. 701, 737 (1989): After establishing who is a policymaker, it is for a jury to determine whether an unconstitutional policy or acquiescence in a longstanding custom or practice caused the harm.

In this case the facts showing the respondents' express policies and their widespread customs concerning the arming of intoxicated individuals should not be disregarded merely because respondents did not predict the precise incident that occurred. Guns in the hands of persons who are under the influence of alcohol has entirely predictable results as to the conduct and harm likely to occur.

The facts in this case frame the issue of whether respondents' policies, customs and practices were so obviously likely to cause the kind of harm that occurred here that they should be held liable even though they did not foresee the identities of the persons involved or the specific facts.

CONCLUSION

Given the frequency of similar incidents and the divergent views of the circuits, this Court should grant the petition and settle the issue.

Respectfully submitted

CAROL A. WATSON
Counsel of Record
MANES & WATSON
3435 Wilshire Boulevard
Suite 2900
Los Angeles, California 90010
(213) 381-7793

Appendix A

GERALD A. HUFFMAN; GUNILLA LUKSE,
Plaintiffs-Appellees, Cross-Appellants,
v.
COUNTY OF LOS ANGELES; SHERMAN BLOCK,
Defendants-Appellants, Cross-Appellees.
Nos. 97-55176, 97-55230, 97-55341

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

147 F.3d 1054; 1998 U.S. App. LEXIS 13241; 98 Cal. Daily Op. Service 4827; 98 Daily Journal DAR 6842

April 8, 1998, Argued, Submitted, Pasadena, California
June 23, 1998, Filed

PRIOR HISTORY: Appeals from the United States District Court for the Central District of California. D.C. No. CV-95-04071-HLH-JGx. Harry L. Hupp, District Judge, Presiding.

DISPOSITION: REVERSED AND REMANDED.

COUNSEL: Barry M. Wolf, Martin Stein, Timothy T. Coates, Greines, Martin, Stein & Richland, Beverly Hills, California, for defendants-appellants County of Los Angeles and Sherman Block.

Carol A. Watson, Manes & Watson, Los Angeles, California, for plaintiffs-appellees Gerald A. Huffman and Gunilla Lukse.

JUDGES: Before: Jerome Farris, Diarmuid F. O'Scannlain, and Ferdinand F. Fernandez, Circuit Judges. Opinion by Judge O'Scannlain.

OPINIONBY: DIARMUID F. O'SCANNLAIN

OPINION: [*1056] OPINION

O'SCANNLAIN, Circuit Judge:

We must decide whether the County of Los Angeles may be held liable under the Fourteenth Amendment for failing to warn its off-duty sheriff's deputies against carrying firearms while intoxicated.

I

John Huffman was shot and killed on August 14, 1994, during a barroom brawl with Thomas Kirsch, an off-duty deputy employed by the Los Angeles County Sheriff's Department. On the day of the incident, Kirsch arrived alone at Whitney's Steakhouse ("Whitney's"), a restaurant and bar, between 6:00 p.m. and 7:00 p.m. Kirsch, who was neither in uniform nor on duty, had started drinking earlier in the day. When he arrived at Whitney's, he was carrying his personal, off-duty revolver in the waistband of his pants. The gun was loaded with department-issued ammunition. Kirsch was also carrying his official identification. While at Whitney's, Kirsch consumed four or five "screwdrivers in a bucket," drinks containing vodka and orange juice.

At approximately 8:00 p.m., John Huffman and his girlfriend Deena Hughes also arrived at Whitney's. In a little over an hour, they drank two or three beers each and shared a "kamikaze," a

mixed hard-liquor drink. After sitting near Kirsch, Huffman and Hughes, who did not know Kirsch before that evening, began to engage him in conversation. Kirsch did not tell Huffman that he was a sheriff's deputy; instead, he stated that he owned an air conditioning company.

Huffman and Kirsch did not talk continuously because Huffman was "up and around." Huffman "kept going down to" Kirsch, would get "right in his face," and then would come away "bouncing and verbal and vulgar." Although the conversation was "not angry," and Kirsch did not appear "upset," he was "a little resentful" of some of Huffman's questions, which he considered "a little private." At one point, Hughes "nudged Kirsch's elbow and said be careful, because he's an Olympic wrestler." Hughes made this comment in case "[Huffman] was getting on [Kirsch's] nerves or bothering him."

As the conversation progressed, a witness testified, "there was a little aggression going on between [Kirsch and Huffman.]" Huffman eventually offered Kirsch $ 40.00 to "go out and settle this." Kirsch responded by telling Huffman to "put your money down." The witness stated that Kirsch was "fed up" with Huffman, and that "Kirsch was saying more or less I'm not going to back down, put your money down, let's see it." This exchange occurred more than once. At some point, Kirsch said, "I'm going to go for it," or some similar remark.

Kirsch and Huffman were still talking when Hughes left the dance floor bar and went to the parking lot of Whitney's to bring Huffman's truck around to the front of the restaurant. Huffman then left the bar, and Kirsch followed by a separate route. After Kirsch walked out the door, he was taken to the ground by Huffman, who had wrestled in high school and college, and had coached college wrestling. Kirsch never gave Huffman any commands, nor did Kirsch identify himself as a

police officer.

Kirsch later told investigators that while he was struggling on the ground with Huffman, he was thinking: "The fight's on, get the gun out," but "clarified . . . that it was not my intention to pull a weapon and shoot Mr. Huffman." Kirsch subsequently testified: "I did not draw the weapon out. The weapon was coming out. I got a hold of the weapon. It was not a draw and shoot." Nevertheless, Kirsch's finger "went to the trigger." Kirsch fired the gun, which was pressed against Huffman's chest, killing Huffman.

Kirsch was taken to a police station and tested twice on an alcohol breathalyzer at approximately 11:30 p.m. Each test registered .209%. The Huffmans' toxicology expert, Darrell Clardy, opined that Kirsch's blood alcohol was around .25% at the time he shot Huffman - approximately 9:00 p.m. Clardy concluded that Kirsch "was significantly intoxicated by alcohol," and "was drunk in the mental aspects." Huffman's blood-alcohol level was .18% at the time of [*1057] his death. Huffman's autopsy revealed that Huffman had used between "a third of a line and a line" of cocaine within four hours of the shooting.

Huffman's parents, Gerald Huffman and Gunilla Lukse ("the Huffmans"), brought a section 1983 action against the County of Los Angeles, Sheriff Sherman Block (in his individual and official capacities)[1], and Deputy Kirsch (in his individual and

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[1] Hereinafter, defendants County of Los Angeles and Sheriff Block will be referred to collectively as "the County."

official capacities)[2], claiming that the County had violated the Huffmans' substantive due process rights, as guaranteed by the Fourteenth Amendment. At trial, the Huffmans introduced evidence concerning the Los Angeles County Sheriff's Department's policies on carrying guns off duty and while intoxicated. The Huffmans' expert witness, James Fyfe, testified that the sheriff's department had devoted insufficient attention to the unlawful use of firearms by off-duty deputies, including deputies' use of firearms while intoxicated. Fyfe relied on department reports indicating that sixty-three off-duty shootings and seventeen off-duty brandishings occurred from 1989 to 1994. Fifteen of these shootings or brandishings involved the use of alcohol. Although Fyfe acknowledged that these incidents had all been investigated by the department, he deemed the investigations deficient, particularly with respect to allegations of alcohol use. After the close of the Huffmans' case and again after the close of the County's case, the County moved for judgment as a matter of law under Rule 50 of the Federal Rules of Civil Procedure, but the motions were denied.

The jury returned a special verdict in favor of the Huffmans, and awarded them $ 750,000 in damages. The County thereupon filed a renewed motion for judgment as a matter of law under Rule 50, which was again denied. The district court entered judgment in favor of the Huffmans, awarding them $ 450,000 after subtracting the $ 300,000 settlement with Kirsch. The County then filed a motion for a new trial and again renewed its Rule 50 motion. Both motions were denied. This appeal followed.

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[2] Prior to trial, Kirsch settled with the Huffmans for $ 300,000, and was dismissed with prejudice as a defendant.

II

Judgment as a matter of law is appropriate when the evidence, "viewed in the light most favorable to the nonmoving party," could not reasonably support the verdict. *Amarel v. Connell*, 102 F.3d 1494, 1517-18 (9th Cir. 1997). We review the district court's denial of the County's motion for judgment as a matter of law de novo. See *Pierce v. Multnomah County*, 76 F.3d 1032, 1037 (9th Cir.), cert. denied, 136 L. Ed. 2d 397, 117 S. Ct. 506 (1996).

Section 1983 states that "every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . ." 42 U.S.C. § 1983. The Huffmans contend that the County deprived them and their son of rights guaranteed by the Due Process Clause of the Fourteenth Amendment. That clause provides that no State shall "deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV. The Due Process Clause has been interpreted to protect substantive as well as procedural rights. See *Washington v. Glucksberg*, 138 L. Ed. 2d 772, 117 S. Ct. 2258, 2267 (1997) (collecting cases). The Huffmans contend that the County violated their son's right to life, as well as their right to a relationship with their son. Our decisions have recognized the existence of both of these substantive due process rights. See *Smith v. City of Fontana*, 818 F.2d 1411, 1417-18 (9th Cir. 1987).

To be held liable under section 1983, a person must act "under color of" law. 42 U.S.C. § 1983. The trial judge

determined "as a matter of law that [Kirsch] was not acting under color of law when Mr. Huffman was shot and killed." The judge later instructed [*1058] the jury that Kirsch was acting neither under color of law nor within the scope of his employment at the time of the incident.

The Supreme Court has interpreted the phrase "under 'color' of law" to mean "under 'pretense' of law." Screws v. United States, 325 U.S. 91, 111, 89 L. Ed. 1495, 65 S. Ct. 1031 (1945). A police officer's actions are under pretense of law only if they are "in some way 'related to the performance of his official duties.'" *Van Ort v. Estate of Stanewich*, 92 F.3d 831, 838 (9th Cir. 1996) (quoting Martinez v. Colon, 54 F.3d 980, 986 (1st Cir. 1995)). By contrast, an officer who is "'pursuing his own goals and is not in any way subject to control by [his public employer],'" *id.* (quoting *Mark v. Borough of Hatboro*, 51 F.3d 1137, 1151 (3d Cir. 1995)), does not act under color of law, unless he "purports or pretends" to do so, *id.* Officers who engage in confrontations for personal reasons unrelated to law enforcement, and do not "purport[ ] or pretend[ ]" to be officers, do not act under color of law. *Id.*; see also *Parrilla-Burgos v. Hernandez-Rivera*, 108 F.3d 445, 449-51 (1st Cir. 1997); *Barna v. City of Perth Amboy*, 42 F.3d 809, 815-18 (3d Cir. 1994); *Pitchell v. Callan*, 13 F.3d 545, 547-48 (2d Cir. 1994).

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Kirsch was neither on duty nor wearing his uniform on the evening he shot Huffman. Although the weapon Kirsch was carrying was loaded with ammunition issued by the sheriff's department, the weapon itself was Kirsch's own. Moreover, despite a written department policy requiring off-duty officers to "identify themselves as police officers before taking any action, safety permitted," Kirsch never identified himself as a sheriff's deputy on the evening of the shooting. Finally, Kirsch never issued any commands to Huffman. Viewed in their

totality, these facts compel the conclusion that Kirsch's actions were not "in some way 'related to the performance of his official duties.'" Van Ort, 92 F.3d at 838 (quoting Martinez v. Colon, 54 F.3d at 986). Accordingly, the district court did not err in ruling that Kirsch's actions did not occur under color of law, and therefore could not give rise to liability on the part of the County under conventional section 1983 analysis.

III

Notwithstanding its conclusion that Kirsch did not act under color of law when he shot Huffman, the district court ruled that the County could be held liable for Kirsch's actions. The contours of section 1983 liability for harms inflicted by persons not acting under color of law are shaped by the Supreme Court's decision in *DeShaney v. Winnebago County Dept. of Soc. Servs.*, 489 U.S. 189, 103 L. Ed. 2d 249, 109 S. Ct. 998 (1989). In *DeShaney*, Joshua DeShaney and his mother contended that the Winnebago County Social Services Department deprived Joshua of liberty without due process of law in violation of the Fourteenth Amendment by failing to protect him from violence at the hands of his father. See *id.* at 191. The Supreme Court held that the state was not constitutionally obligated to protect Joshua:

> Nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without "due process of law," but its language

> cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means.
>
> . . . .
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> As a general matter, then, we conclude that a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause.
> *Id.* at 195-97.

There are two exceptions to the general rule that "a State's failure to protect an individual against private violence . . . does not constitute a violation of the Due Process Clause." *Id.* at 197. First, "'when the State takes a person into its custody and holds him there against his will, the Constitution imposes some responsibility [*1059] for [that person's] safety and general well-being.'" See *Wang v. Reno*, 81 F.3d 808, 818 (9th Cir. 1996) (quoting *DeShaney*, 489 U.S. at 199-200)). It is undisputed that Huffman was not in custody when the shooting occurred.

The second exception to the DeShaney rule against holding state officials liable for private violence exists where the state affirmatively places the plaintiff in a dangerous situation. See *L.W. v. Grubbs*, 974 F.2d 119, 121 (9th Cir. 1992) ("Grubbs I"); *Wood v. Ostrander*, 879 F.2d 583, 589-90 (9th Cir. 1989). This exception is based upon the following excerpt from *DeShaney*:

> While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them. That the State once took temporary

> custody of Joshua does not alter the analysis, for when it returned him to his father's custody, it placed him in no worse position than that in which he would have been had it not acted at all . . . . 489 U.S. at 201 (emphasis added).

The danger-creation exception to DeShaney was first recognized by this court in *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989). In Wood, a woman who was raped after the car in which she was a passenger was impounded by a police officer brought a section 1983 suit against the officer. See *id.* at 586. We held that because the officer "'affirmatively placed the plaintiff in a position of danger,'" the officer could be held liable under section 1983. *Id.* at 589-90 (quoting *Ketchum v. County of Alameda*, 811 F.2d 1243, 1247 (9th Cir.1987)).

We again applied the danger-creation exception in *Grubbs I*. In *Grubbs I*, a registered nurse employed by the state of Oregon at a medium-security custodial institution brought suit against state prison officials after she was assaulted by an inmate. See 974 F.2d at 120. We held that the prison officials could be held liable under section 1983 because they "created the danger to which [the plaintiff] fell victim" by selecting a violent sex offender to work alone with her. *Id.* at 121. We explained that the "'danger creation' basis for a claim . . . necessarily involves affirmative conduct on the part of the state in placing the plaintiff in danger." *Id.*

On appeal from our remand of *Grubbs I* to the district court, we addressed the level of culpability upon which a state official can be held liable under the danger-creation theory. See *L.W. v. Grubbs*, 92 F.3d 894 (9th Cir. 1996) ("Grubbs II"). We held that, to prevail under this theory, it is not sufficient for the plaintiff to demonstrate that the state official was grossly

negligent. See *id.* at 899-900. Instead, we held, "the plaintiff must show that the state official participated in creating a dangerous situation, and acted with deliberate indifference to the known or obvious danger in subjecting the plaintiff to it." *Id.* (emphasis added).

Finally, in *Van Ort v. Estate of Stanewich*, 92 F.3d 831 (9th Cir. 1996), we examined whether the victims of an assault and attempted robbery by an off-duty San Diego County deputy not acting under color of law could sue the County under section 1983. Among the issues we addressed in Van Ort was the causal relationship that a danger-creation plaintiff must establish between the state official's action and the deprivation of the plaintiff's constitutional rights. See *id.* at 836-37. We held that "pointing to a municipal policy action or inaction as a 'but-for' cause is not enough to prove a causal connection . . . . Rather, the policy must be the proximate cause of the section 1983 injury." *Id.* at 837. We then examined whether the deputy's "private acts" constituted "intervening causes which preclude . . . County liability." *Id.* We concluded, "as a matter of law," that because the deputy's intervening "private acts" were "unforeseeable," they broke the chain of proximate cause connecting action under color of law to the alleged violation of constitutional rights. *Id.* Accordingly, we affirmed the district court's judgment as a matter of law in favor of the County. See *id.* at 842.

The Huffmans contend that they have established that the County is liable under the danger-creation theory by demonstrating: (1) that the sheriff's department had a policy of requiring deputies, including Kirsch, [*1060] to carry guns at all times while off duty; and (2) that the department failed to warn its deputies about the dangers of carrying firearms while intoxicated. The Huffmans further maintain that the department

knew of eighty incidents from 1989 to 1994 in which off-duty deputies discharged or brandished firearms. Of these incidents, fifteen involved the use of alcohol[3]. According to the Huffmans, the department failed to take adequate steps in investigating these incidents or in disciplining the officers involved. While conceding that the department has a policy against being "drunk and disorderly" in public, the Huffmans contend that this policy is not "tied in any way to whether or not you carry a gun off duty."

Viewing this evidence in the light most favorable to the Huffmans, we hold, following Van Ort, that the "facts do not show, as a matter of law" that the County could have foreseen Kirsch's "private acts" when it allegedly required him to carry a gun off duty. Van Ort, 92 F.3d at 837; see also Springer v. Seaman, 821 F.2d 871, 876-77 (1st Cir. 1987) (although "the question of proximate causation [in a section 1983 action] is sometimes for the court and the sometimes for the jury," the court decides whether reasonable disagreement on the issue is tenable). According to the Huffmans, these "private acts" were as follows: (1) Before the incident, Kirsch consumed four or five hard-liquor drinks, elevating his blood-alcohol level to approximately .25%; (2) Kirsch exchanged unpleasant words with Huffman in the bar, after which Huffman exited the bar with the intention of going home; (3) Kirsch followed Huffman out of the bar by a separate route, even though Kirsch knew that he had a gun tucked in his belt and that Huffman was unarmed; and (4) Kirsch shot Huffman in the chest as the men wrestled outside the bar. Even assuming arguendo that the County did

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[3] There are 7,500 deputies in the Los Angeles County Sheriff's Department. Thus, from 1989 to 1994, there was one alcohol-related shooting or brandishing per 3,000 deputies per year.

require Kirsch to carry a gun off-duty, as the Huffmans contend, the County could not "reasonably have foreseen" Kirsch's lethal "private acts." *Van Ort*, 92 F.3d at 837.

Our conclusion is supported by the existence of a sheriff's department policy prohibiting deputies from behaving in a "drunk and disorderly" manner in public. The Huffmans offer two reasons why this policy should fail to shield the County from liability. First, the Huffmans maintain, the department's policy fails to protect the public from deputies who, like Kirsch, are "drunk" but not "disorderly." We cannot agree with the Huffmans' contention that Kirsch was not acting "disorderly" on the night of the shooting. According to the Huffmans' own version of events, Kirsch consumed at least four hard-liquor drinks, followed an unarmed man who had once challenged him but who had decided to go home without fighting, and shot that man in the chest. In light of these alleged facts, the Huffmans' contention that Deputy Kirsch's actions were not "disorderly," and therefore in violation of the department's policy, is difficult to fathom.

The Huffmans also contend that the department's policy against "drunk and disorderly" behavior was insufficient to shield the county from liability because it was not "tied in any way to whether or not you carry a gun off duty." The gist of the Huffmans' argument seems to be that, in addition to its policy against being drunk and disorderly, the department should have had a rule against being drunk and disorderly while carrying a gun. However, simple logic compels the conclusion that a general rule barring drunk and disorderly behavior also prohibits such behavior while one is carrying a firearm.

The Huffmans maintain that specifically warning deputies concerning the dangers of mixing alcohol and firearms would

be more effective than the existing general admonition against drunk and disorderly behavior with respect to deterring shootings by intoxicated officers. However, even if the Huffmans could conclusively demonstrate that such warnings would reduce the frequency of these incidents, and thereby help to protect the public, they would not have established that the County's existing policies violate the Constitution. See *DeShaney*, 489 U.S. at 195 ("[The Due Process [*1061] Clause] forbids the State itself to deprive individuals of life, liberty, or property without 'due process of law,' but its language cannot fairly be extended to impose an affirmative obligation on the state to ensure that those interests do not come to harm through other means.") The danger-creation exception to DeShaney does not create a broad rule that makes state officials liable under the Fourteenth Amendment whenever they increase the risk of some harm to members of the public. Rather, the danger-creation plaintiff must demonstrate, at the very least, that the state acted affirmatively, see *Wood*, 879 F.2d at 589-90, and with deliberate indifference, see *Grubbs II*, 92 F.3d at 900, in creating a foreseeable danger to the plaintiff, see *Van Ort*, 92 F.3d at 836-37, leading to the deprivation of the plaintiff's constitutional rights, see *id.* at 836[4]. Whether or not the

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[4] Our sister circuits disagree as to whether the danger-creation exception applies only when the danger created by a state official is directed toward a particular plaintiff, as opposed to being directed toward the general public. Compare *Reed v. Gardner*, 986 F.2d 1122 (7th Cir. 1993) ("When the police create a specific danger, they need not know who in particular will be hurt. Some dangers are so evident, while their victims are so random, that state actors can be held accountable by any injured party.") (emphasis added), with *Mark v. Borough of Hatboro*, 51 F.3d 1137, 1153 (3d Cir. 1995) ("When the alleged unlawful act is a policy directed at the public at large .

County's failure specifically to prohibit deputies from carrying guns while drinking was bad policy, it did not violate John Huffman's rights under the Fourteenth Amendment, because the County could not have foreseen Kirsch's actions.

IV

Because Kirsch's private acts were not foreseeable by the County, and did not occur under color of law, we hold that the district court erred in denying the County's motions for judgment as a matter of law. Accordingly, we reverse the judgment of the district court and remand with instructions to dismiss[5].

REVERSED AND REMANDED.

. . the rationale for the [danger creation] rule disappears."). Because the Huffmans' claim would fail regardless of whether the danger-creation theory extended to threats to the general public, we leave resolution of this question for another day.

[5] Because the Huffmans are not "prevailing parties," they are not entitled to attorneys' fees under 42 U.S.C. § 1988(b).

Appendix B

FILED

OCT 16 1998

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GERALD A. HUFFMAN; GUNILLA LUSKE, Plaintiffs-Appellees,	)	Nos. 97-55176, 97-55230 97-55341
v.	)	D.C. No.CV-95-04071-HLH-JGx
COUNTY OF LOS ANGELES; SHERMAN BLOCK, Defendants-Appellants.	)	**ORDER**

BEFORE: FARRIS, O'SCANNLAIN, and FERNANDEZ, Circuit Judges.

The panel has voted to deny the petition for rehearing. Judges O'Scnnlain and Fernandez have voted to reject the suggestion for rehearing en banc, and Judge Farris recommends rejection of the suggestion for rehearing en banc.

The full court was advised of the suggestion for rehearing en banc. An active judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for rehearing is REJECTED.